IN THE

Supreme Court of the United States

October Term, 1973

No. 73-2014

MISSOURI PORTLAND CEMENT COMPANY,

Petitioner,

v.

CARGILL, INCORPORATED,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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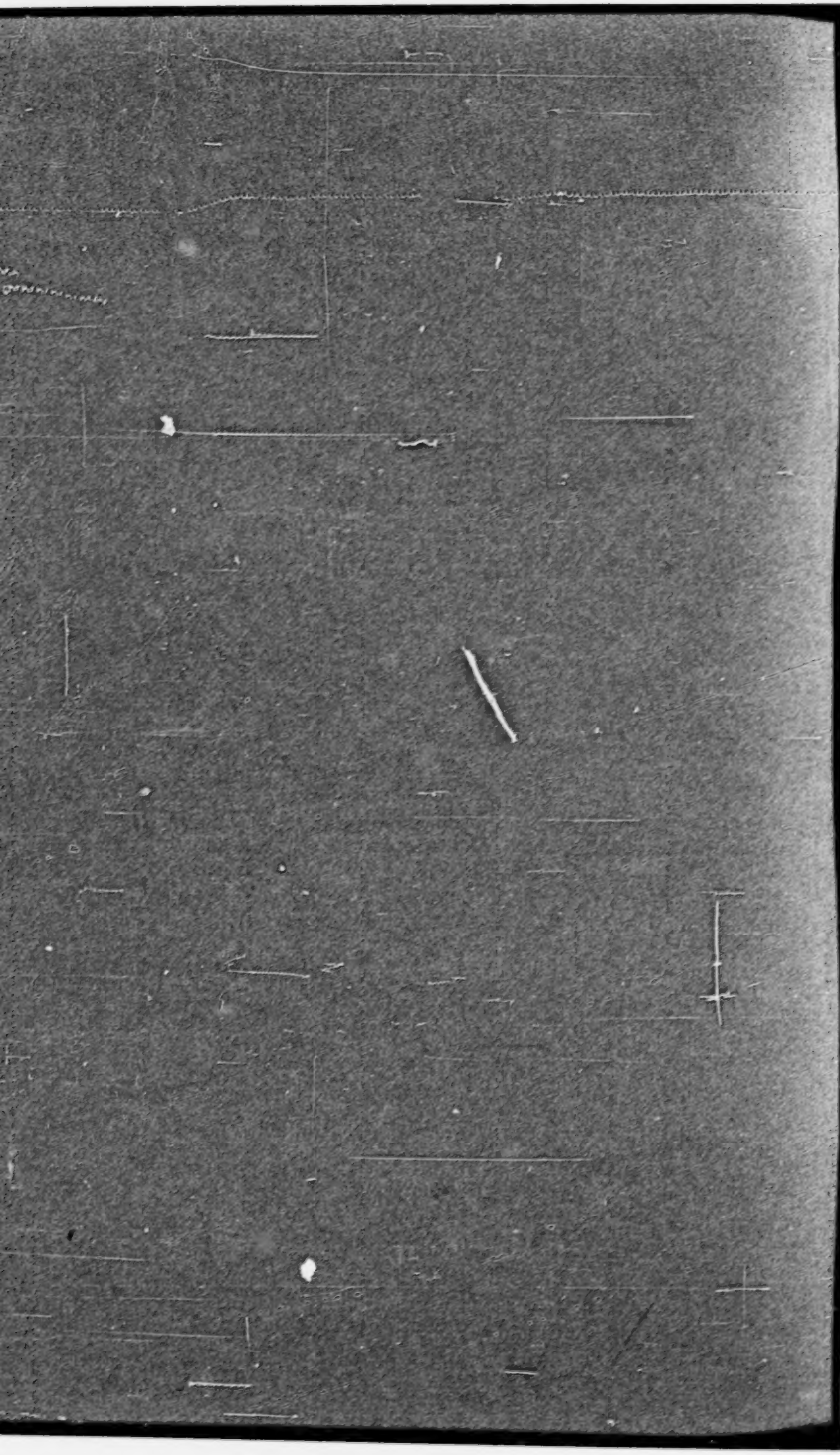

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Questions Presented	2
Statement of the Case	3
Missouri Portland and the Cement Industry	4
Cargill and Its Tender Offer	7
The Court of Appeals Decision	12
Argument	17
I. The Court of Appeals was correct when it required proof of a violation to be based on the facts of this case rather than on the facts as found in other cases not dealing with cement	18
II. There is no conflict between the decision of the Court of Appeals and that of any other court as to the proof necessary to establish a violation of §7 on an entrenchment theory	23
III. This case does not present the question this Court reserved for future decision in *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973), and *United States* v. *Marine Bancorporation, Inc.*, No. 73-38 (U.S., filed June 26, 1974)	26
IV. The Court of Appeals correctly held that an allegation of public harm is insufficient by itself to warrant the grant of a preliminary injunction absent a showing of probability of success on the merits	29
V. Review of this interlocutory appeal would be inappropriate	33
Conclusion	33

TABLE OF AUTHORITIES

PAGE

Cases:

Cobbledick v. United States, 309 U.S. 323 (1940) 33

Ecko Products Co. v. Federal Trade Commission, 347 F.2d 745 (7th Cir. 1965) 25

Federal Trade Commission v. Procter & Gamble Co., 386 U.S. 568 (1967) 12, 13, 15, 19, 21, 22, 24, 25
Ford Motor Co. v. United States, 405 U.S. 562 (1972) .. 13, 19

General Foods Corp. v. Federal Trade Commission, 386 F.2d 936 (3d Cir. 1967), *cert. denied,* 391 U.S. 919 (1968) 25
Gulf & Western Industries, Inc. v. The Great Atlantic & Pacific Tea Co., 476 F.2d 687 (2d Cir. 1973) 31

Kennecott Copper Corp. v. Federal Trade Commission, 467 F.2d 67 (10th Cir. 1972), *cert. denied,* 42 U.S.L.W. 3555 (April 1, 1974) 18, 19, 21, 22, 25

Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247 (2d Cir. 1973) 16

United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973) 12, 13, 19, 21, 26, 27, 28, 29
United States v. General Dynamics Corp., 42 U.S.L.W. 4368 (U.S., March 19, 1974) 3
United States v. Marine Bancorporation, Inc., 42 U.S.L.W. 5210 (U.S., June 26, 1974) 26, 27, 28, 29
United States v. Penn-Olin Chemical Co., 378 U.S. 15[illegible] (1964) 13, 19
United States v. Phillips Petroleum Co., 367 F.Supp. 1226 (C.D. Cal. 1973), *aff'd,* 42 U.S.L.W. 3710 (U.S., July 3, 1974) 14

PAGE

United States Steel Corp. v. Federal Trade Commission, 426 F.2d 592 (6th Cir. 1970) 25, 26

Statutes:

Clayton Antitrust Act, §7, 15 U.S.C. §18 ..... *passim*

Other Authorities:

Economic Report on Mergers & Vertical Integration in the Cement Industry, Staff Report to the Federal Trade Commission (April, 1966) 5

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BRIEF FOR RESPONDENT IN OPPOSITION

Petitioner Missouri Portland Cement Company ("Missouri Portland") seeks to obtain a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case which reversed an order of the United States District Court for the Southern District of New York preliminarily enjoining respondent Cargill, Incorporated ("Cargill") from extending its tender offer for the stock of Missouri Portland. Although the pe-

tition purports to reveal conflicts between the decision of the Second Circuit in this case and decisions of this Court and of other courts of appeals, the various conflicts are illusory. The court of appeals merely applied precedents of this Court to the facts of this case in reaching its decision.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, filed June 10, 1974, still unreported, is set forth in Appendix A to the Petition.*

The opinion of the United States District Court for the Southern District of New York, set forth in Pet. App. B, is reported at 375 F.Supp. 249.

Questions Presented

Each of the questions raised by the petition has been rephrased to reflect the actual thrust of the argument presented by Missouri Portland.

1. Are the same conclusions and inferences required in every case brought under Section 7, no matter how much the facts and the industry may vary from those supporting previous decisions of this Court?

2. Is the acquisition by a larger company of a company which is a member of an oligopoly in at least one submarket *per se* illegal?

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* "Pet. App." refers to the appendices to the Petition for a Writ of Certiorari. "App." refers to the joint appendix in the United States Court of Appeals for the Second Circuit.

3. Is the acquisition illegal *per se* where the evidence is that the acquiring company would not enter the market *de novo* and that there is no toe-hold acquisition possibility?

4. Should a preliminary injunction issue in every tender offer in which the acquiring company merely studies the target company, receives recommendations that the acquisition would be desirable and actually makes a tender offer?

5. Should this Court review a decision merely reversing the grant of a preliminary injunction on the ground of insufficient evidence?

Statement of the Case

As the court of appeals noted, "[t]here is not much controversy over the basic facts" (Pet. App. A at 5a). The district court failed to recognize that these facts revealed that the cement industry in this case is markedly different from other industries considered in previous opinions; therefore, it committed an error when it adopted uncritically the conclusions and inferences that courts have approved for those industries but which are at odds with the facts of this case. Cf. *United States* v. *General Dynamics Corp.*, 42 U.S.L.W. 4368, 4375 (U.S., March 19, 1974). As the petition omits significant facts essential to an understanding of the decision of the court below, it is necessary to restate the facts in more substantial form.

Missouri Portland and the Cement Industry

Missouri Portland manufactures portland cement at three plants located in St. Louis, Missouri on the Mississippi River, Independence (Kansas City), Missouri on the Missouri River, and Joppa, Illinois on the Ohio River. It sells the cement produced at these three plants to customers located in an 11-state area.* Two of Missouri Portland's principal competitors, Dundee Cement and River Cement, each has one plant located in Missouri on the Mississippi River, from which each sells cement through all or most of Missouri Portland's 11-state area as well as several other states bordering the Gulf of Mexico on the south and the Mississippi River to the north. The inland river system provides a cheap and efficient transportation network.

Missouri Portland's present productive capacity is 10 million barrels per year, approximately 2% of national capacity, which makes it the twentieth largest cement producer in the country. Within its own 11-state area, its capacity represents approximately 8% of total industry capacity.** Eight of the ten largest portland cement producers in the country compete with Missouri Portland in parts of its sale's territory but none competes in all of its territory.

For purposes of the proceeding in the court of appeals, respondent did not challenge the relevancy of metropolitan markets. Thus the court below based its analysis on peti-

* Alabama, Arkansas, Illinois, Indiana, Iowa, Kansas, Kentucky, Mississippi, Missouri, Nebraska and Tennessee.

** Its share of capacity serving the 11-state area is less since many plants located outside the 11-state area ship cement into those 11 states.

tioner's market position in certain metropolitan areas.* In this Court respondent assumes, *arguendo,* for the purposes of this petition that the four metropolitan markets upon which the district court relied are appropriate for antitrust analysis. However, respondent emphasizes again that the evidence on market percentages presented by petitioner is, as the court of appeals noted, subject to serious question (Pet. App. A at 6a n. 4).

Perhaps the most important facts in this case relate to the potential new entrants into the district court's four submarkets. The last twenty-five years have brought a dramatic increase in capacity and new entrants to the cement industry in the United States. Fourteen companies entered the industry through construction of new plants.** In all but three cases the new entrant was closely linked to the cement industry: five of the companies were ready-mix-concrete manufacturers (the principal customers for portland cement); three were affiliated with natural gas companies (fuel being one of the principal cost factors in producing portland cement); one was a firm engaged in oil well cementing; one was a major foreign cement manufacturer; and one was a joint venture of two firms primarily engaged in mining nonferrous metals (similar to limestone, the principal component in portland cement). Five other companies entered the industry by acquisition; four of these companies

* Since an oligopolistic market is a prerequisite for a finding of a §7 violation under petitioner's theory, it should be noted that, if Cargill establishes in the trial on the merits the correctness of its contention that the smallest market the court can permissibly consider is the 11-state market, there would be too many firms in the relevant market to require further inquiry.

** *Economic Report on Mergers & Vertical Integration in the Cement Industry,* Staff Report to the Federal Trade Commission (April 1966).

were broad-line building material suppliers and the fifth was a large construction company. Another foreign company, Ciments La Farge, the largest cement producer in France and Canada, has recently announced a $50 million joint venture with Lone Star in Alabama.

In addition to new entrants on a national level, regional cement companies have expanded to national scope by the acquisition of other regional cement companies and through the construction of additional plants.* Numerous producers in the mid-West have also entered local submarkets, as used by the district court, by establishing a terminal on a navigable river and barging cement to that terminal from an existing plant. In fact, it is undisputed that Missouri Portland uses its own fleet of barges as virtually the sole means by which it transfers cement from its three plants to its eight distribution terminals.**

Finally, existing cement company plans for new or expanded plants will add millions of tons of new capacity in the next three years. Missouri Portland, itself, is presently engaged in the expansion of one of its existing plants by an amount equal to 40% of present company capacity.

Not surprisingly these plant expansions and new entrants have led to numerous changes in industry position

* Five cement companies have discussed a merger with Missouri Portland within the last twenty years. In addition, following the announcement of Cargill's tender offer, numerous companies both within and outside the cement industry discussed a merger with Missouri Portland.

** Memphis, Tennessee; Decatur, Alabama; Nashville, Tennessee; Owensboro, Kentucky; Louisville, Kentucky; Omaha, Nebraska; Peoria, Illinois and Chicago, Illinois.

since 1950. United States Steel (Universal Atlas Division) was the largest cement producer in the country in 1950 and is only the fifth largest today. Lehigh was the second largest in 1950; Alpha was the fifth largest in 1950. Neither is among the top ten today.

Cargill and Its Tender Offer

Respondent Cargill, Incorporated is a large diversified corporation. Its total assets as of May 31, 1973 was $1.104 billion; if it were included in the list of *Fortune* Magazine's list of American industrial corporations it would rank 126th. Net income for fiscal year 1973 was $108 million, which would place it 67th among American industrial corporations. Due to the nature of the businesses in which it operates and its corporate policy of cutting costs, operating on low margins and relying on volume for profits, net profits have totalled only 1.3% of sales over the last five years.

Cargill's principal source of revenue comes from the purchase and sale of agricultural products and their by-products. It is engaged primarily in the grain, vegetable oil processing, feed sales, agricultural chemicals, sugar, molasses, poultry processing, fertilizer, flour milling and corn wet milling industries; grain sales, however, constitute 40% of its total revenues. In each of these "bulk commodity" businesses there are companies comparable in size to Cargill; none of these "bulk commodity" companies is in the cement business.*

* *E.g.*, General Mills, Pillsbury, International Milling, Continental, Bunge, Dreyfus, Cook, Ralston Purina, Central Soya, Hanna Mining, Peabody Coal, Consolidated, DeKalb, Pioneer, Archer Daniels, Morton Salt, International Salt, Diamond Crystal, DuPont, Monsanto, Corn Products.

For over thirty years Cargill has encouraged its various departments to study expansion of present markets and diversification into potential new industries. In virtually every diversification actually undertaken, however, the new line of business was closely and obviously related to Cargill's principal lines of business. Thus, for example, entry into the barging and ocean shipping businesses was a natural step for a company whose primary business is buying grain from farmers and selling it on a delivered basis to customers. Similarly, Cargill's country grain elevators were a natural focus for its feed and fertilizer sales. Other lines of business are clearly related to the processing of agricultural products: molasses, corn wet milling, vegetable oil and poultry. As to its entry into the salt business, Cargill was a distributor for a salt company through its river terminals long before it went into the production end of the business. Significantly, when Cargill entered the salt business it tried to use molasses salesmen to sell both products. The result was such a complete failure that the molasses salesmen were transferred back to their original jobs and new salt salesmen were hired. This contrasts with Missouri Portland's general assertion of the transferability of skills among bulk commodities.*

The facts surrounding the proposed acquisition of Missouri Portland are both typical and unique in the above pattern of diversification. Literally hundreds of studies of potential expansions and diversification have been conducted by various departments during the past ten years. Cargill's Salt Department, which accounts for 0.6% of Car-

* Similarly, Missouri Portland's characterization of Cargill's diversification as "invariably" by toe-hold acquisition or *de novo* is unsupported in the record.

gill's overall sales, conducted studies of many new industries.* One of these industries was the portland cement industry. A variety of initial reports were furnished by members of the Salt Department and by outside consultants, and interviews were conducted with cement companies to develop an understanding of the cement industry.**

All of these studies agreed on one finding: Cargill should not enter the portland cement business by the construction of a new plant. Several reasons were given: long delay between investment and the time production comes "on stream," the extremely high cost of building a new plant† and Cargill's complete lack of knowledge about the industry were the principal reasons stressed in each report. It was felt that, although there were some similarities between cement and salt on the grossest levels, the cement industry was totally alien to any of Cargill's experience. Thus in September 1973, Cargill was neither a supplier of raw materials or services to cement producers, a marketer of cement, nor a substantial purchaser of cement, aside from its limited internal needs. It did not buy from or sell to the principal customers of cement companies: the ready-mix concrete industry. Production of portland cement is completely different from that of Cargill's

* *E.g.*, coal, limestone, zinc, kaolin, fluorspar, asphalt, potash, chlorine, caustic soda.

** The initial Salt Department study was based on the assumption that the maximum outlay would be $10 million. In August, 1973 the Salt Department was informed that the figure could be exceeded.

† At the hearing in the district court, the president of Missouri Portland's cement division testified that it would cost $200 million to duplicate Missouri Portland's facilities; Cargill's tender offer was for approximately $45 million, which includes Missouri Portland's two non-cement subsidiaries.

other products and the distribution and sales systems are unrelated to any present Cargill operation, except for the fact that cement like almost all non-consumer goods is shipped by rail and barge. In light of all of these differences between cement and Cargill's other lines of business, *de novo* entry, with its high cost, was deemed unacceptable.

Although an interim report circulated inside the Salt Department had discussed the possibility of acquiring a company with an annual output of 1½ to 3 million barrels of cement, the report submitted to Cargill's Long Range Planning Committee—the first point at which the possibility of actual entry was scrutinized by Cargill decision-making personnel—listed only two alternatives: first, the acquisition of Missouri Portland, and, as a second choice, the acquisition of three smaller companies whose joint capacity equalled Missouri Portland's. A similar report was received from the Finance Committee; it too listed Missouri Portland as the number one choice as an entry vehicle.

The LRPC decided that "if we find a proper entry into the cement industry, the LRPC looks favorably on it . . .", that acquisition of Missouri Portland was the "number one priority *if* we can obtain 51% at a reasonable price," and that Cargill "should investigate Amcord [one of the ten largest cement companies in the nation] further." The Committee agreed that Cargill would not enter the cement industry *de novo* for the reasons given by the Salt Department and rejected the possibility of entering by acquiring the three smaller cement companies because of the serious manufacturing, marketing, raw material and management

problems such acquisitions would entail.* Following the recommendations of the LRPC, Cargill's Board of Directors approved the acquisition of Missouri Portland. The record clearly reveals that Cargill's LRPC and Board of Directors viewed cement as an investment opportunity—a business which would be profitable if entered at the right price. Nowhere is there any mention that there might be any economies to other Cargill operations following entry into cement, nor that Cargill would provide a cement company with any rare resource.

In October 1973 Cargill contacted Missouri Portland and was informed that Missouri Portland was not interested in selling. Missouri Portland's chief executive officer and the president of its cement division both testified that they had never imagined that Cargill would be interested in entering the cement industry prior to Cargill's contacting Missouri Portland in October 1973. Cargill then contacted four other cement companies, all at least comparable in size to Missouri Portland.** United States Steel and Dundee were not interested in selling. Amcord was rejected because the price demanded was too high and because it could be bought only with several non-cement money-losing subsidiaries.

* For example, Valley had only 20-25 years of limestone and the quality of its limestone was so poor it required sweetening with oyster shells, which were available only in limited quantities; also, its per unit costs were high and it was located on a river which did not have sufficient water all year round to barge cement. The head of Missouri Portland's cement division testified that it was essential to have an adequate supply of limestone near the plant. Coplay's plants had very high operating costs and Giant was located in South Carolina, an area Cargill was not interested in entering.

** U.S. Steel's and Amcord's cement facilities are over twice the size of Missouri Portland's; River's and Dundee's are 60% and 70% the size of Missouri Portland's. No consideration was given to acquiring smaller cement companies. "If the subject was brought up, it was discarded" (App. 848).

The owners of River Cement, the Mississippi River Corporation, demanded a price that Cargill felt was prohibitively expensive—over twice as much per ton of capacity as the tender offer for Missouri Portland. As a result Cargill concluded that the only remaining way for it to enter the cement business was through a tender offer to the stockholders of Missouri Portland (App. 426).

The Court of Appeals Decision

In an extensive, carefully reasoned opinion by Judge Friendly, the court of appeals analyzed each of petitioner's three theories* and rejected each as being totally unsupported on the facts of the case. The court first dealt with what petitioner refers to as the "wings effect." Initially the court carefully distinguished *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973), and *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568 (1967), highlighting the close relationship between the acquiring and acquired companies in those cases in contrast to the lack of such a relationship between the parties in the present case. It then went on to make the inquiry mandated by those cases—that is, would the companies presently competing in the relevant markets view Cargill as a potential entrant into those markets if it were enjoined from acquiring Missouri Portland and similar companies. The court concluded:

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* Petitioner defines these as entry effect, wings effect, and entrenchment. Alternatively they are known as actual potential entrant, perceived potential entrant, and dominant entrant. *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 558-562 (1973) (Marshall, J., concurring in the result).

> "Obviously Procter & Gamble had no intention of geting out of the detergent business or Falstaff out of the beer business and, so long as that continued, firms in the bleach or beer markets would fear their entry. But, as already indicated, there is no evidence that anyone in the cement business had dreamed of Cargill as a potential entrant until it sent out letters seeking information about the industry in March 1973. And there is no reason to believe that, if its current effort to enter the industry is frustrated, anyone in the cement business will regard it as a potential entrant in the future." Pet. App. A at 23a.

In reaching this conclusion, the court of appeals highlighted the error of the district court which had assumed that Cargill would automatically remain on the edge of the market even if entry by acquisition was enjoined because this Court in *Falstaff, Procter & Gamble, United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964), and *Ford Motor Co.* v. *United States*, 405 U.S. 562 (1972), had reached such a conclusion when the acquiring and acquired companies were closely related. As the court of appeals stated, Cargill "had never before been regarded as a potential entrant and was not likely to remain one if its rational choice of a method of entry was barred." (Pet. App. A at 23a)

The court of appeals then analyzed the evidence supporting petitioner's initial theory—that Cargill would in fact enter the relevant markets *de novo* or by toe-hold acquisition if prevented from acquiring Missouri Portland. The court of appeals first noted that there was no evidence that Cargill would enter these markets *de novo* and that virtually all of the evidence was to the contrary; in fact, counsel for Missouri Portland admitted as much (App.

450).* The court then turned to the issue of whether Cargill might enter the relevant markets by a toe-hold acquisition. After discussing certain conceptual problems with the toe-hold analysis in the cement industry, the court reviewed the total inadequacy of the district court's findings on this theory: none of the plants or companies cited by Missouri Portland and discussed by the district court could be described as "toe-hold" under *United States* v. *Phillips Petroleum Co.*, 367 F.Supp. 1226, 1258 (C.D. Cal. 1973), *aff'd*, 42 U.S.L.W. 3710 (U.S., July 8, 1974). Further, the court noted, with respect to several of the smaller companies mentioned by Missouri Portland, there were significant reasons why Cargill would not consider an acquisition—e.g., insufficient reserves of critical raw materials or inadequate transportation potential. Thus, the evidence before the district court was clearly insufficient to support any conclusion that Cargill could and would actually enter any of the four submarkets either *de novo* or by toe-hold acquisition.**

Finally the court of appeals examined the arguments presented by Missouri Portland on the entrenchment theory. Here again the court noted that the district court

* Although Missouri Portland contends in its petition that the court of appeals never found any of the district court's findings "clearly erroneous" (Petition, p. 17, n. 2), that statement is inaccurate as the analysis of the court of appeals reveals (Pet. App. A at 24a; *see also, e.g.*, Pet. App. A at 20a, n. 20 with respect to the district court's findings on edge effect).

** The court of appeals noted that, because of the result reached on the facts with respect to Missouri Portland's first two theories, it did not have to decide the question advanced most strenuously by Cargill—that it could only be found to be in violation of §7 if it were the most likely or one of the most likely of a small group of potential entrants (Pet. App. A at 27a, n. 30).

had made a fundamental error in law in carrying over the language of cases involving totally dissimilar industries to the facts of the present case. Thus, the district court's misplaced reliance on *Procter & Gamble* (Pet. App. B at 78a) is revealed as error by the court of appeals' analysis of the contrasting industry patterns (Pet. App. A at 29a). The undisputed facts and the testimony of Missouri Portland's officers reveal that Missouri Portland presently competes successfully with companies with assets comparable to Cargill's. Nor would Cargill's acquisition of Missouri Portland provide Missouri Portland with *any* advantage in competing with existing companies;* this is in marked contrast to the facts as related by the Federal Trade Commission and this Court in *Procter & Gamble.***

In summary, the court of appeals unanimously concluded that Missouri Portland was far short of making the requisite showing of probability of success on the merits to justify preliminary relief: "[i]n view of the weakness of the 'entrenchment' claim, the lack of proof that Cargill

* The court of appeals took particular care in examining the alleged transportation preference which Cargill could provide Missouri Portland (Petition, p. 11). It concluded that any advantages Cargill might conceivably have in barges were already possessed by Missouri Portland (Pet. App. A at 14a, n. 11).

** In its petition in this Court, Missouri Portland stated that it was "unequivocally" stated that Cargill intended to expand Missouri Portland substantially once it acquired it. The district court made a similar reference to the expansion of Missouri Portland (Pet. App. B at 78a). Neither statement is accurate. Cargill's chief executive officer testified "unequivocally" that it and when Cargill acquired control of Missouri Portland, he would meet with Missouri Portland's management and discuss where, when and to what extent Missouri Portland's capacity should be expanded (App. 867). It was his testimony that the reason Cargill was seeking to acquire an existing cement company was that it did not have the knowledge about the industry to allow it to make such decisions. Further, it is uncontradicted that Missouri Portland is presently expanding its capacity by 40% without any help from any "deep pocket."

exerted any 'edge effect' on present competitive conditions, and the slim likelihood that Cargill would enter the markets here in question *de novo* or by toe-hold acquisition. . . ." (Pet. App. A at 29a). The court then went on to analyze the alternative standard for preliminary injunctive relief stated in *Sonesta International Hotels Corp.* v. *Wellington Associates,* 483 F.2d 247, 250 (2d Cir. 1973): a substantial question of law coupled with a "decided" tipping of the balance of hardships toward the applicant.* The court of appeals carefully reviewed the hardships which the district court had purportedly balanced and concluded that a fundamental error of law had occurred: that any foreseeable private harm to Missouri Portland could be effectively eliminated by a much narrower injunction while the weight given by the district court to harm to Cargill had been drastically minimized without any basis in law. Further the court concluded that the public interest in the antitrust laws which Missouri Portland was allegedly seeking to vindicate could not of itself support an injunction absent a showing of probable violation of the antitrust laws; that is, the mere allegation by Missouri Portland that the proposed acquisition was a violation of §7 would not activate any "public interest." The public interest only exists if there is a probability that the acquisition actually violates §7, especially in light of the public interest in preserving markets for capital unless there *is* a violation of the antitrust laws.**

Following the unanimous opinion of the court of appeals, Missouri Portland petitioned for rehearing and sug-

* It should be noted that this alternative means of obtaining a preliminary injunction has not been adopted in several circuits.

** The court of appeals also affirmed the district court's holding that Missouri Portland had violated the Williams Act by making a materially misleading statement in opposing Cargill's tender offer.

gested the appropriateness of consideration *en banc*. The petition for rehearing was denied, and no active judge even requested a vote on the suggestion of *en banc* treatment. Missouri Portland then applied to this Court for a stay of the mandate of the court of appeals. That application was denied by Mr. Justice Marshall, the Circuit Justice for the Second Circuit, in an order dated July 10, 1974. The application was resubmitted to Mr. Justice Douglas, who, in an order dated July 12, 1974, granted a stay pending this Court's ruling on the petition for a writ of certiorari. Cargill then moved this Court to vacate the stay entered by Mr. Justice Douglas. In an order dated July 25, 1974, this Court vacated the stay previously issued. On July 25, 1974, Judge Stewart vacated his previous injunction against Cargill and entered a modified injunction in conformity with the opinion of the court of appeals.

Argument

Petitioner has tried to formulate four questions meriting plenary consideration by this Court. Careful scrutiny of those questions reveals that they are without merit and certainly not so substantial and important as to merit review of the decision of the court of appeals which merely found that Missouri Portland had failed to sustain the burden necessary for obtaining a preliminary injunction.

I

The Court of Appeals was correct when it required proof of a violation to be based on the facts of this case rather than on the facts as found in other cases not dealing with cement.

Petitioner's first contention is that since the court below emphasized that the facts before the district court revealed no close relationship between Missouri Portland and Cargill the court was somehow holding "that the doctrine of potential competition does not apply to pure conglomerate mergers." (Petition, p. 18) This "holding" is said to conflict directly with the holding of the Tenth Circuit in *Kennecott Copper Corp.* v. *Federal Trade Commission,* 467 F.2d 67 (10th Cir. 1972), *cert. denied,* 42 U.S.L.W. 3555 (April 1, 1974), and inferentially with the holding of several opinions of this Court. Nothing could be further from the truth. Rather what the court of appeals clearly recognized was that the district court had relied on factual inferences and conclusions found to be justified by this Court and the court in *Kennecott* on the basis of the facts in those cases, but which were totally inappropriate to the cement industry in these four markets. Even a cursory reading of the opinion below reveals that the court dealt directly with the questions that the decisions of this Court have mandated as dispositive of claims involving actual potential entry, perceived potential entry, and entrenchment. What it rejected was the notion that the factual conclusions found justified in other cases mandated the same factual conclusions in the present case.

This analysis is best revealed by considering exactly how the court below dealt with the three theories propounded by Missouri Portland. As to the actual potential entry theory, the question that the court must answer is would the acquiring company probably enter the relevant markets either *de novo* or by a toe-hold acquisition if the proposed method of entry is enjoined. In the present case, as the court below noted, all of the subjective evidence and a substantial amount of objective evidence demonstrated that Cargill would not enter *de novo* and that there were no viable toe-hold candidates. Subjective evidence may be overcome by objective evidence that points to the probability of entry, *e.g., Falstaff*. One of the principal objective factors which courts have relied on in this area is the similarity of product lines of the two companies, *e.g., Penn-Olin, Ford Motor, Procter & Gamble, Falstaff*. Similarly in *Kennecott*, the Tenth Circuit specifically relied on the evidence that Kennecott would probably enter the coal business due to several objective factors—the close similarity in mining techniques which are critical in both industries, the substantial demand for coal by copper companies, Kennecott's previous acquisition of Knight Ideal Coal Company. But none of those factors is present in this case. As the court below noted, there are no such objective factors that would lead any reasonable man to assume that Cargill would enter any of the four cement markets if its acquisition of Missouri Portland is enjoined. Thus, the court refused to draw the inference, appropriate to cases in which there is in fact a close relationship between the acquiring company and the industry it seeks to enter, that the decision to make a tender offer *a priori* reflects an intent to enter the industry by any means. Such an inference would

be inappropriate in this case and in fact is rebutted by the clear record evidence. This does not mean, however, that the actual potential entry theory cannot be used in a conglomerate case. On the contrary, if there were evidence that Cargill's management probably would enter any of the four markets by building a plant or by a toe-hold acquisition if it could not acquire Missouri Portland there would be no problem with this element of the case. That evidence is, however, not present in this case.

The degree of relationship between the lines of business of the tenderer and the target company is even more significant under Missouri Portland's second theory—the "wings" effect or perceived potential entry. Under this theory the question that the court must answer is the following: If Cargill is enjoined from acquiring any non-toehold company, would the companies in the four relevant markets *believe* that Cargill was one of the most likely potential entrants *de novo* or toe-hold. Obviously, the degree of relationship between the two companies may be of critical importance under this theory. As this Court stated, it was probable that nothing Falstaff could say or do would convince the companies presently in the New England beer market that Falstaff was not a likely potential entrant since it was the largest producer outside that region and since there were reasons aside from profitability of the New England sales supporting entry: *e.g.*, substantial advertising and promotional advantages associated with being a national brand. Similarly, nothing that Procter & Gamble did or said could convince the bleach manufacturers that it would not probably enter that field based on its position as the dominant producer of the most com-

plementary product, laundry soap. The evidence in *Kennecott* is even more compelling since there the court noted Kennecott did buy substantial amounts of coal and "the possibility that Kennecott would become a producer . . . was a factor in a Kennecott-Peabody negotiation for the purchase of coal," 467 F.2d at 77. On the other hand, the dramatic differences between cement and Cargill's various lines of commerce remove any basis in law or in logic for such an inference in the present case. The evidence is clear that prior to its contacting the companies in the industry no one ever considered Cargill a potential entrant into cement. The conclusion that was appropriate in *Falstaff*, *Procter & Gamble*, and *Kennecott* is simply not supported by the facts of this case.

Finally, we turn to the last of petitioner's theories, the entrenchment argument. The court of appeals correctly analyzed the issue in terms of whether there had been a showing of a probability of impact on the markets by the acquisition. Since Missouri Portland and others within the four markets were able to compete with comparable sized companies, *e.g.*, United States Steel, the likelihood of the mere size of Cargill having any impact was minimal. On the other hand, Missouri Portland has raised the specter of short supply in the cement industry and Cargill's "deep pocket." (Petition, p. 11) Even without stopping to decide whether such a theory is appropriate in the merger field, it is clear on the record of this case that Missouri Portland has had no trouble in financing any expansion that it deems necessary—*e.g.*, it is presently engaged in the expansion of its Joppa, Illinois plant by an amount equal to 40% of present over-all company capacity. Except for pollution control devices being financed through a tax-free municipal

bond issue, the total cost of this expansion is being met by internal funds. Nor can Cargill bring any transportation advantage to Missouri Portland in these four markets through the use of Cargill's barge fleet since, as the court below noted, Missouri Portland already owns its own fleet of specially-designed barges while Cargill owns no such barges.* In contrast, we have the repeated emphasis of this Court in *Procter & Gamble* on the reduced cost of advertising available to Clorox as part of Procter and the substantially stronger marketing position of Clorox as part of Procter. Nor does *Kennecott Copper* present a holding that the mere size and "deep pocket" of the acquiring company is sufficient to warrant a finding of a violation of §7. The Tenth Circuit emphasized that the primary area of competition in the coal industry was for long-term utility supply contracts. These could only be obtained if the coal company had vast reserves. Thus, "it was likely that this 'deep pocket' of funds would be employed to acquire vast coal reserves and massive mining developments...." 467 F.2d at 78. It was not merely a deep pocket which supported the court's holding, but rather the clear way in which that deep pocket could be of substantial competitive advantage in the industry.**

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* Further, as the court of appeals cogently recognized, barge transportation is completely irrelevant as a competitive factor to Missouri Portland in two of the four markets upon which the district court relied—St. Louis and Kansas City—since in both of those markets the cement goes directly from the local *plant* (not terminal) to the customer by truck.

** The fact that the court below, in a footnote to its opinion upon which Missouri Portland relies most heavily for its alleged conflict between the circuits (Petition, pp. 19-20), intimates in *dicta* that it does not agree with the full *Kennecott* opinion hardly establishes a "conflict" worthy of this Court's attention when the case is so clearly and obviously distinguishable and distinguished from the present case.

II

There is no conflict between the decision of the Court of Appeals and that of any other court as to the proof necessary to establish a violation of §7 on an entrenchment theory.

In the district court, Missouri Portland showed that Cargill was a large corporation with substantial amounts of cash, that the cement industry is relatively capital-intensive, that Cargill engaged in substantial amounts of shipping both by barge and by rail, and that cement can be shipped by barge and by rail, although most cheaply by barge. In this Court Missouri Portland argues that this supports a finding of substantial transportation advantage and an intent to substantially expand Missouri Portland.* Unfortunately for Missouri Portland the facts of this case reveal all too clearly that Cargill's acquisition of Missouri Portland would have no such effect on Missouri Portland—and it is a probable effect on the market place which is the reason any acquisition is condemned under §7. As discussed above, Cargill's barge fleet would be of no advantage to Missouri Portland since Missouri Portland already owns its own fleet of barges specially designed to carry portland

* The evidence concerning the "substantial expansion" of Missouri Portland by Cargill is found in a memorandum by one of the members of the Salt Department asking for a plan to make Cargill the number one cement company within twenty years. Initially it should be noted that such an expansion would mean that the cement part of the salt department—a department which presently has sales less than Missouri Portland's annual sales—would have a net worth of $439 million. Even the memo's author referred to it as "Blue Skying"; the chief executive officer of Cargill testifying under oath had a stronger characterization of the "plan" when he described its author as "a dreamer" (App. 409) and stated that he did not think that it could be done.

cement and cannot even use barges in two of the four markets.

Nor has there been *any* showing by Missouri Portland that it is wise or fiscally desirable to expand production beyond the present 40% increase in production it is presently undertaking. Certainly if Missouri Portland has access to any information it would be as to the profitability of further expansion—no such evidence was ever proffered. Thus, Cargill's "deep pocket" will allegedly entrench Missouri Portland by providing financing for which Missouri Portland has shown no need for an expansion which it has not even offered to prove is desirable.* In summary, the court of appeals did not make any extraordinary pronouncement when it required some showing of how Cargill's alleged financial and transportation advantages could possibly affect competition in any of the four markets before it would condemn the acquisition.

Nor do the cases which Missouri Portland cites to this Court (Petition, pp. 22-23) even suggest a different result. On the contrary, they are entirely consistent with the opinion of the court below as that court specifically noted (Pet. App. A at 28a n. 32). As clearly demonstrated above both this Court in *Procter & Gamble* and the Tenth Circuit

* The testimony of Cargill's chief executive officer was that he had no idea what kind of expansion was desirable for Missouri Portland. Rather, if and when Cargill acquired Missouri Portland he would sit down with Missouri Portland's management which knew the business economics and the markets and ask them if further expansion were wise at this or some future date (App. 867). Further, the alleged temporary short supply in the cement business is insufficient basis for a finding of a probability that Cargill would expand Missouri Portland "substantially" in light of the downturn in the construction industry—the chief use for cement.

in *Kennecott Copper* described and relied upon clearly identifiable ways in which the acquired company's competitive position would logically be substantially improved. As to the other three cases cited by Missouri Portland one need only examine the entire opinion in each to see how hard petitioner has struggled to create a "conflict" out of thin air.

(1) In *Ecko Products Co.* v. *Federal Trade Commission,* 347 F.2d 745 (7th Cir. 1965), the court relied on the *actual* impact of the merger on the market: the acquisition of McClintock by Ecko provided McClintock, which the court specifically noted "had little cash and was subject to a highly restrictive loan agreement," 347 F.2d at 752, with the financial resources with which it was able to purchase Blackman, an acquisition which the court found was clearly unlawful. (2) *General Foods Corp.* v. *Federal Trade Commission,* 386 F.2d 936 (3d Cir. 1967), *cert. denied,* 391 U.S. 919 (1968), is in almost all significant aspects identical to this Court's decision in *Procter & Gamble.* In both cases, the Commission and the Court relied heavily on the evidence that the acquired company, once it was a part of the much larger acquiring corporation, would have access to substantially cheaper advertising time and would quite probably obtain better "shelf space." Such evidence was deemed critical in *General Foods* since it implied almost certain destruction of what the court called "an almost perfectly balanced duopoly." 386 F.2d at 938. The court could clearly see the mechanism by which the acquisition would probably, almost certainly, affect competition. (3) Finally, the quotation used by Missouri Portland in its petition reveals the concern of the court in *United States Steel Corp.* v. *Federal Trade Commission,* 426 F.2d 592, 603-604 (6th

Cir. 1970), with being able to clearly define the process by which the acquisition would have an impact on the relevant markets. As that case involved the acquisition by the largest portland cement company in the market of the largest non-integrated ready-mix concrete company it was suspect on vertical grounds. But the court went on to specify how the added financial resources and stability and advantages of vertical integration would make the ready-mix company more competitive after the acquisition as well as deterring new entrants, 426 F.2d at 605. Further, it takes little imagination to see how U.S. Steel's "extensive financial and personal contacts throughout the building industry" might aid a company whose product is sold exclusively to the building industry.*

III

This case does not present the question this Court reserved for future decision in *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973), and *United States* v. *Marine Bancorporation, Inc.*, No. 73-38 (U.S., filed June 26, 1974).

Missouri Portland's third point attempts to profit by the confusion of two theories which even it admits are separate. Thus, there is the contention that the case conflicts with *United States* v. *Marine Bancorporation, Inc.*, 42 U.S.L.W. 5210 (U.S., June 26, 1974), in relying on the find-

* Although the court does comment on the "sheer size" of United States Steel, it does so only in the specific context of discussing the extension of credit and the exploitation of "allied personal and financial ties in the building industry," 426 F.2d at 604; since the principal defense raised by U.S. Steel was the "failing company defense," the extension of credit is clearly, immediately and substantially significant insofar as Certified's ability to compete for new jobs is concerned.

ing that the evidence is entirely that Cargill would not in fact enter any of these markets either *de novo* or by toehold acquisition. However, that is exactly the question that this Court has always asked in determining whether an acquisition may violate §7 under the actual potential entry theory. Only when the Court discusses perceived potential entry does it disregard the internal memoranda and factors which make clear that no other mode of entry would ever occur. In the prefatory section of its third point, Missouri Portland seeks to convince this Court that, even though the clear and unequivocal objective *and* subjective evidence, see Pet. App. A at 24a, compels the conclusion that no such alternative means of entry would take place, the evidence is somehow insufficient to avoid liability under the actual potential entry theory. When all of the evidence reveals that Cargill has no reason to enter the industry other than that it can, if it acquires Missouri Portland for $45 million, expect to make an adequate return on its investment, and that construction of the equivalent capacity would be more than four times as expensive, *de novo* entry is effectively eliminated from consideration.

Missouri Portland next contends that, accepting the conclusion that Cargill could but would not enter the cement business, this Court is now presented with the opportunity to resolve the question reserved in *Falstaff Brewing* and *Marine Bancorporation*. One might wonder how a company which, Missouri Portland is willing to concede for purposes of this third point, would not enter the cement business and which would have no impact on the companies in the market as a perceived potential entrant could violate §7 of the Clayton Act which requires that "the effect of such acquisition may be substantially to lessen competition, or to tend

to create a monopoly." The answer is simply that it would not and this reveals the fact that Missouri Portland has clearly misconstrued the *Marine Bancorporation* opinion.

Marine Bancorporation states that one of the two preconditions or elements of the question left open by the Court in *Falstaff* is "that feasible alternate methods of entry in fact existed." 42 U.S.L.W. at 5221. In *Marine Bancorporation*, the state law restricting branch banking prevented the Government from showing that acquisition of one of the two toe-hold candidates would do other than substitute one bank incapable of further branching in the Spokane area for another. In the present case, the economics of the cement industry and the objective facts provide a similar constraint. As the court of appeals concluded there is *no* company in these four markets which could be called a toe-hold and has the essential raw materials and transportation necessary to be viewed as a viable competitor.*

This leaves only the possibility of *de novo* entry by Cargill. The facts indicate that Cargill can make a profit if it acquires Missouri Portland for approximately $45 million. It may even make a substantial profit. But the president of Missouri Portland's cement division testified that it would cost $200 million to produce a company with the same capacity as Missouri Portland. Allowing for improved efficiency in producing cement that such a new plant would have, there is still nothing but financial suicide revealed by such a cost per barrel of capacity. In reality, the reason why Cargill "would" not enter *de novo* insures

* See Pet. App. A at 25a-26a. Every company suggested as a toe-hold has too substantial a market share in one or more markets; for example, River has 24% of the St. Louis market and 21% of the Memphis market.

that it "could" not enter *de novo* on a profitable basis. Thus, the prerequisite for consideration of the question reserved in *Falstaff* is, as in *Marine Bancorporation*, not present and it would clearly be inappropriate to grant certiorari on that basis. Similarly, it is clear that the court of appeals was merely applying the holdings of this Court when it held that a company which would not enter the industry either *de novo* or by toe-held acquisition cannot be in violation of §7 under an actual potential entry theory if it acquires one of the companies already in the market.

IV

The Court of Appeals correctly held that an allegation of public harm is insufficient by itself to warrant the grant of a preliminary injunction absent a showing of probability of success on the merits.

In its last alleged basis for a writ of certiorari, Missouri Portland seeks to convince this Court that the court of appeals ignored the high value this Court has put on the use of private antitrust actions to enforce the antitrust laws. That contention is just as groundless as the previous ones. The court of appeals did see a serious threat to capital markets if a target company in a tender offer situation could obtain a preliminary injunction—which would stall the tender for years—merely on the allegation that the acquisition would violate §7. But that does not mean that the court ignored the importance of private suits in enforcing the public laws. On the contrary, the court was well aware of the importance of such private actions when they are brought to prevent *violations* of the law. What the court refused to accept was the implicit allegation that the "public interest" attaches on the mere filing of

the case. There is no public interest in enjoining tender offers that do not violate the antitrust laws, just as there is an overriding public interest mandating an injunction if the acquisition would violate the law.

The sole question the court below considered was the type of showing which is sufficient to warrant the issuance of a preliminary injunction in a private suit where the effect of granting the preliminary injunction may very well be the discontinuance of the tender offer before a ruling on the merits. The court of appeals merely stated that unless Missouri Portland can show that there is a reasonable probability of its proving at the trial on the merits that the acquisition would violate the antitrust laws the alleged "public harm" will not support, by itself, the grant of a preliminary injunction.

The wisdom of such a standard is quite clear when we consider exactly what facts Missouri Portland did prove in the preliminary injunction hearing. The facts which Missouri Portland proved are the following: that subordinate officials at Cargill had studied the cement industry and Missouri Portland; that they had recommended entry, but only by acquisition, into that industry as "logical"; that Cargill had never been viewed as a potential entrant into the industry prior to its present study; that there were no reasons why it would be viewed as a likely potential entrant if it were prevented from acquiring Missouri Portland; that Missouri Portland has a substantial market share in some of its markets when they are defined narrowly; that Cargill's management had approved entering the cement business if it could acquire Missouri Portland at a reasonable price; and that a tender offer was made for the

stock of Missouri Portland. Both of these factors are present in virtually every tender offer: no company makes any significant tender offer unless it studies the business first and determines that entry would be desirable and profitable (can one reasonably anticipate that a company would enter a new business after it was told that such entry would be "illogical"), and what company of any size does not have a "significant" share of at least some narrowly defined market. Finally, no tender offer would be brought without the approval of management. The point is that these facts do not establish any probable violation of §7. If such an insubstantial showing coupled with the allegation of a violation of §7 is sufficient to support a preliminary injunction, there will be no unfriendly tender offers. It was only in this context that the court of appeals held that when no probable violation of the antitrust laws has been shown, as herein, the public interest in private antitrust litigation does not justify preliminary relief (Pet. App. A at 35a n. 35 and 39a).*

In essence all that petitioner is arguing is that the court of appeals did not properly balance all the relevant equity factors in determining whether it had carried its burden of proving that the equities justified a preliminary injunction. But the court explicitly considered all of the relevant factors: the public interest in antitrust enforcement, the interests of the target corporation, the interests of the shareholders, the interests of respondent, and even the interest of management. The court held after reviewing

* When a showing of a probability of a violation of §7 has been made, the Second Circuit has not hesitated to affirm a preliminary injunction. See, for example, *Gulf & Western Industries, Inc. v. The Great Atlantic & Pacific Tea Co.*, 476 F.2d 687 (2nd Cir. 1973).

these factors that Missouri Portland had failed to carry its burden of showing that the equities tipped decidedly, or even at all, in favor of granting a preliminary injunction. That ruling based on a careful consideration of the lengthy record in this case is hardly the type which requires this Court's attention.

In its last plea Missouri Portland cites the fact that Cargill may succeed in acquiring it before the case can reach trial on the merits and discontinue this action. Once again, however, this is no justification for the grant of a preliminary injunction unless Missouri Portland can show that it will probably establish that the acquisition would violate §7. Nor is it self-evident that Cargill will obtain control of Missouri Portland which has staggered three year terms for its board of directors. Finally, it need only be noted that private actions, no matter how important they may be in controlling actual violations of the law, are not the only way in which the public interest is protected. Both the Justice Department and the Federal Trade Commission have unquestioned authority to act in the public interest in this case. In fact Missouri Portland is well aware that the Federal Trade Commission is giving careful consideration to the issues raised in this case. In such a case, when the petitioner is unable to show probability of success on the merits, it demeans the integrity of the court of appeals to contend that that court ignored the public interest in the private prosecution of antitrust actions.

V

Review of this interlocutory appeal would be inappropriate.

It has been the policy of this Court to deny writs of certiorari to review decrees of the courts of appeals reviewing interlocutory orders unless some extraordinary question is presented. *Cobbledick* v. *United States,* 309 U.S. 323, 324-325 (1940). No such circumstance is present in this case. If this Court were to grant the petition, the only issue before it would be whether the court of appeals abused its discretion in reversing the grant of a preliminary injunction. The merits of this case have not been tried. Only the question of the sufficiency of the evidence presented by Missouri Portland to support a preliminary injunction was before the court of appeals. The court ruled that the evidence was definitely insufficient. As has been clearly demonstrated above, there is no conflict amongst the circuits created by the ruling of the court below. Nor did the court of appeals enunciate any new and extraordinary principles of law. Thus review at this point would be totally inappropriate.

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 9, 1974

CERTIFICATE OF SERVICE UNDER RULE 33

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-2014

MISSOURI PORTLAND CEMENT COMPANY,

Petitioner,

-vs-

CARGILL, INCORPORATED,

Respondent.

GORDON B. SPIVACK, one of the attorneys for Respondent, Cargill, Incorporated, certifies that on the 9th day of August, 1974, three copies of Brief of Respondent in Opposition to Missouri Portland Cement Company's Petition for Writ of Certiorari were served by personal service upon Davis, Polk & Wardwell, attorneys for Petitioner, Missouri Portland Cement Company, at One Chase Manhattan Plaza, New York, New York 10005.

Gordon Spivack

GORDON B. SPIVACK